THE SUPREME COURT OF THE CONFEDERATE STATES OF AMERICA.

In order to arrive at the decision that there was anything in the Confederate States of America that served the purpose of a Supreme Court it is first necessary to get clearly in mind the difference between a Confederacy and a Union. It is held by many authorities that what really brought on the Civil War was the fact that, while the Southern states held to the idea that the United States was in reality a confederacy, the Northern states considered it a union and desired to make it a more perfect union.

The Century dictionary defines "confederacy" as an aggregation of persons, parties, states or nations united by a league or confederation, and explains the meaning by the following quotation from J. Fiske's, American Political Ideas. "In the great Delian confederacy which developed into the maritime empire of Athens, the Aegean cities were treated as allies rather than subjects."

The same dictionary defines "union" as that which is united or made into one. Something formed by a combination of various parts, or individual things or persons. The distinction between these two words is still further brought out by some of their synonyms. Some of those given for confederacy are alliance, league, association, coalition, federation, federal compact, joint stock, co-partnership, cartel. Some of those for union are combination, mixture, unification, fusion, blending, centralization, incorporation, amalgamation, alloy, coalescence.

It is apparent that the more perfect a union the greater the extent to which the parts forming the union lose their individuality, while in the case of a confederation the individual parts continue to retain their individuality. It was apparently the object from the beginning on the part of the Confederate States of America to form a real confederacy, and in so far as it was possible to do so to avoid any semblance of a union.

This opinion is borne out by the preamble of the Confederate Constitution itself. The preamble of the Constitution of the United States begins with the words, "We, the people of the United States, in order to form a more perfect Union," while

that of the Confederate States of America began with the words, "We, the people of the Confederate States, each state acting in its sovereign and independent character."

In the same way all through the Constitution the Federal Constitution was taken paragraph by paragraph, and changes made in it which were either considered as improvements, or, more important from the standpoint of the framer, emphasized the idea of a confederacy rather than that of a union. The early act of the congress of the Confederate States of America carried this idea still further.

At the time of the framing of the Confederate Constitution and during the sessions of congress that followed, that which naturally required most attention was the providing for the military defense of the seceding states, for it was apparent that many states in addition to the New England states placed the solidarity of the Union above that of state rights. When South Carolina seceded on December 20, 1860, there were those who believed that all the states except the New England states would recognize the rights of states to be supreme in all respects where authority was specially delegated to the national government by the states. These people expected that New England would join New Brunswick and Nova Scotia. The fact that this did not occur demonstrated the centralized power of the Union, and apparently had some influence upon the future action of the Southern legislators.

The development of the judiciary of the Confederate States of America shows the strong states right sentiment in the South and indicates that as the war went on there was a tendency for it to grow in strength rather than to decrease. A study of the provisional and the final Constitutions of the Confederate States, together with the acts of the congress, show how reluctant the people were to delegate powers to the central government. In the confederacy that was formed powers were not vested in the central government but delegated to it, and there was a strong tendency to guard all state rights with a good deal of jealousy.

In the provisional Constitution, article III, section 1, paragraph 3, reads in part as follows: "The supreme court shall be constituted of all the District Judges, a majority of whom shall

be a quorum and shall sit at such time and place as the Congress shall appoint." It was provided that the judges should be appointed by the president and that "Each State shall constitute a District in which there shall be a court called a district court."

No provision was made for a circuit court, either in this or the final Constitution, although the article was changed somewhat in the final Constitution so as to leave the establishment of the courts in the hands of Congress rather than having the Constitution bring them automatically so to speak into existence. Article III, section 1 of the final Constitution, reads in part:

"The judicial power of the Confederate States shall be vested in one superior court and in such inferior courts as the Congress shall from time to time ordain and establish. The judges of both of the superior and inferior courts shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." These words, as can be seen, are identical with those in the Federal Constitution. As can also be seen this section places the responsibility of providing for and establishing the courts upon congress and does not define except in the most general way what they shall be.

At the first provisional congress, held at Montgomery, Alabama, Act 87, approved March 16, 1861, provided for the establishment of the courts. Section 1 of this act reads: "The Congress of the Confederate States of America do enact; That the supreme court of the Confederate States shall hold annually, at the seat of government, one session commencing the first Monday of January and continuing until the business of said court is disposed of."

Section 2 reads: "That each of the Confederate States shall constitute one district in which there shall be a court called a District Court to consist of one judge, who shall reside in the state for which he is appointed, and shall receive a salary equal to that paid to a judge of the court of the highest jurisdiction in the states where he resides, payable quarterly."

It will be noted that this act is very similar in nature to the clauses in the provisional Constitution that treated of the supreme court. This act, however, was never put into effect, for

the third session of the Congress held at Richmond, Va., passed an act repealing that part of the previous act calling for a session of the Supreme Court. Bradley T. Johnson, in a letter in the Richmond (Va.) Dispatch, July 2, 1899, states that no further attempt was made to organize a supreme court. As a matter of fact, however, in January, 1863, a bill was introduced in congress by Senator Hill of Georgia to establish a supreme court. This bill was amended to establish a court to hear only appeals from the lower court, and the bill so amended was passed in the senate but failed in the house.

Senator Clay proposed an act repealing the act which had been passed repealing the previous act calling for a session of the supreme court, but this failed. The tendency seems to have been more and more away from a central court. For this there were many reasons. The individual states were inclined to feel that the Confederate Government was assuming too great powers. There had not been such a vital need for a national supreme court as to make the establishment of one absolutely necessary. The problem of establishing a central court that would not and could not usurp any of the powers of the state was not easy to solve.

Many of the leading men in the South felt that the Supreme Court of the United States was more or less of a menace and that a court patterned after it would constantly threaten the rights that had already been accorded to the states by the Constitution. In short, that a supreme court of the Confederacy might prove more of a source of trouble than a suitable channel for the settlement of disagreements. In this connection it must again be kept clearly in mind that the Constitution of the Confederate States of America emphasized the independent position of the individual states. In it the Confederate statesmen incorporated those points which they had kept uppermost in the great Constitutional discussions of the previous half of the century. The Constitution went so far as to allow a state legislature to impeach a Confederate official acting within the state and in the provisional Constitution the state officials were not bound by oath to support the central government.

The problem of creating a supreme court which would meet all the requirements was clearly one which would require the

very best of the greatest minds of the South, but these minds were fully employed with the conduct of the war, so nothing was done. Whether or not a supreme court would have been established after peace was declared had the war ended in the independence of the Confederacy is a question. It would have depended to a considerable extent upon how much importance was put upon the supremacy of the states, for if the states individually were supreme, it is apparent that a great many questions that are settled by the Federal Supreme Court could not be settled by a Confederate supreme court, instead they would have to be settled by the state courts.

Nothing can illustrate this point much better than the action that a number of states have taken in regard to the eighteenth amendment. It is evident that if the supremacy of the states were recognized to the extent that it was proposed to recognize them in the Confederate States, no national supreme court could pass upon the constitutionality and validity of that amendment and expect all the states to abide by the decision.

As a matter of fact, as the war went on and it became more and more necessary for the central government to assume greater and greater authority there was greater and greater opposition to that authority. It is quite possible that the martial law declared in Richmond and ten miles around Richmond, on March 2, 1862, and then extended to cover whole states, had a good deal to do with the non-establishment of a supreme court. The states did not recognize the right of the central government to establish martial law and to suspend the writ of habeas corpus. As a result, there was frequent conflict between the state and the central authorities.

This state of affairs did not auger well for the establishment of a supreme court and had its influence in defeating all attempts made to establish one. The conduct of the war, however, had made it necessary to pass laws which apparently should be passed upon by such a court. These laws were the conscription laws.

The judiciary of the states, however, had already been organized and was in working order and it was the supreme courts of these states that had to pass upon these laws. These courts tended to recognize the need of such laws and the right of the

central government to pass them to meet the emergency.

When we mention a supreme court we are inclined to visualize the courts existing under the Federal Government, and not to take into consideration the theories upon which the government of the Confederate States was based. To go back again to the definition of confederacy, we find that a confederacy is more in the class of an alliance. The states were joined together more for the purpose of making and conferring with each other easier and simpler than of centralizing the government. The Confederate States were never a Union in the sense in which the United States is a Union, and every effort was made to prevent a Union being perfected. They were merely an alliance of sovereign states which could, if they so desired, delegate certain powers to the central government. The states, however, were supreme, and it was for the states themselves to decide what powers would be delegated.

Under this theory of government it is apparent that the powers of any central court would be very limited in its jurisdiction. In fact, one of the last attempts made to establish such a court was to make it a court of appeal from the lower courts and vest it with no other jurisdiction, although the first session of the provisional Congress in section 14 of Act 87, approved March 16, 1861, delegated greater powers to the proposed supreme court. This section reads: "The Supreme Court shall have original jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or citizens of any other state or nation."

Since the Confederate States were never recognized by the world as an independent nation, there naturally could be no such cases as those affecting ambassadors, other public ministers and consuls. The duties of the court up to the time that the states did become an independent nation would be confined to cases in which the states were involved, and to have such a court settle state's cases would to a certain degree indicate that the states were not supreme, that they were surrendering a certain amount of power to the supreme court of the Confederacy which was against the principle of the most thorough advocates of states rights.

If the states were to retain their supremacy to the full, it was necessary that no central court actually decide cases, the most that it could do would be to arbitrate cases. In addition, the Confederate States during the life of the Confederacy were in a state of war. Conditions and requirements were very different from what they would be in times of peace. In cases of emergency in both the North and the South martial law was declared and both sections of the country were living under a military rather than a civil regime.

All these things both militated against the organization of a Confederate judicial system, and to a very considerable degree did away with the necessity of anything higher than a state court. Most matters of national importance were decided by the army anyhow.

Naturally, in time of peace, this would not have been the case, and some court corresponding to the Supreme Court of the United States would have to be organized, but it is quite certain that unless the views of the leading men in the South did not change, that no supreme court of the Confederate States would have been vested with as great powers as those which the Supreme Court of the United States exercises.

However, there was no great need, as has already been stated, for such a court. Though some questions, such questions as the conscription laws, had to be passed upon, these affected the individual states, and it is doubtful if the states would have considered that any court outside the state had the authority to pass upon such questions. The Constitution delegated powers to the central government and did not vest it with powers. The states reserved for themselves the exercise of all powers that it was not necessary to delegate to the central government.

Accordingly, the supreme court of the Confederate States of America consisted in reality of the supreme court of the individual states. If the states were sovereign states, if they were merely an alliance, then naturally the supreme courts of these states would be the supreme judiciary. That this idea or theory might not work out well in practice did not change the fact of the matter. When we come to analyze the causes for the failure to establish a supreme court patterned after that of the Federal

Government, we find that no such court could be established without changing the principles upon which the Confederacy was based.

Each state acted in its sovereign and independent character, and it follows that the judiciary of each state must be sovereign and independent if that state was to maintain and retain its sovereign and independent character. In fact, the Federal supreme court was, in the opinion of more than one Southern statesman, one of the most menacing defects of the government of the United States, for the simple reason that it did with such power overide the rights of the individual states and cause the states to become subservient instead of supreme. Since the states were supreme the judiciary must also be supreme. Therefore, the courts of the different states were established while no national supreme court was established. Such a court was not established because in the scheme of things there was no place for it and real need for it. What really constituted the supreme court of the Confederate States of America during the period during 1861 and 1865 were the state supreme courts. There were no higher courts than these for the reason that the states themselves were considered supreme, and in theory at least the central government acted as agent for the states. Powers were delegated by the states, the powers of the central government were limited and the powers of the state increased. Therefore, we see that under the circumstances all that could constitute the supreme court of the Confederate States of America, as long as it was to remain a league of independent states was the supreme court of the individual states. In the cases that were passed upon it was found to work quite satisfactorily on the whole. After similar decisions had been made by the courts of a number of states, the case would be so thoroughly analyzed that the courts of the other states would follow the precedent established and make the same decisions.

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